

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

SMYRNA POLICE EMPLOYEE ASSN.,)	
)	
Charging Party,)	
)	<u>DS/ULP No. 06-04-516</u>
v.)	
)	
TOWN OF SMYRNA,)	
)	
Respondent.)	

Appearances
Ronald Stoner, Esquire, for Smyrna Police Employees Association
Erika Schrader, Esquire, for the Town of Smyrna

The Town of Smyrna (“Smyrna” or “Town”) is a public employer within the meaning of Section 1602(l) of the Police Officers’ and Firefighters’ Employment Relations Act, 19 Del.C. Chapter 16 (1986) (“POFERA” or “Act”). The Smyrna Police Employees Association (“Association” or “SPEA”) is an employee organization within the meaning of Section 1602(g) of the Act and the exclusive bargaining representative of full-time sworn police officers below the rank of Lieutenant employed by the Town within the meaning of Section 1602(h) of the Act.

On April 26, 2006, the Association filed a Petition for a Declaratory Statement and Unfair Labor Practice Charge with the Delaware Public Employment Relations Board (“PERB”) alleging that a \$1500 across-the-board salary increase for calendar year

2006 to all of the Town's non-sworn employees constituted a cost-of-living increase. The Association alleges the bargaining unit employees are also entitled to this increase pursuant to the provision of the parties' collective bargaining agreement entitled, "Cost of Living Adjustment," which provides:

The Town agrees to provide the same Cost of Living Adjustment under this contract as it does for other Town Employees. This section shall not be construed to include occasional salary adjustments to individual positions. The Town shall not use individual salary adjustments to avoid a Cost of Living Adjustment. (Jt. Ex. 1)

The Association alleges that by failing to also increase the salary of its uniformed police officers below the rank of Lieutenant by \$1500 the Town has violated not only the cost-of-living provision in the collective bargaining agreement but also 19 Del.C. §1607(a)(5), which provides:

- (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:
 - (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit.¹

On May 5, 2006, the Town filed its Answer denying the charge and under New Matter alleging that the \$1500 increase to non-sworn employees was an adjustment to the pay scale intended as an interim step toward making the pay of the Town's non-sworn employees competitive with their counterparts in comparable surrounding jurisdictions.

¹ A grievance was also filed by the Association alleging a violation of the Cost of Living Adjustment Provision in the parties' collective bargaining agreement. The parties agreed to hold the grievance in abeyance of the unfair labor practice charge.

Under Affirmative Defenses the Town contends that the Association has failed to state a claim upon which relief can be granted and that PERB lacks subject matter jurisdiction to hear the petition.

On May 15, 2006, the Association filed its Response denying both the New Matter and the Affirmative Defenses raised by the Town.

On May 31, 2006, the Executive Director issued a finding of Probable Cause to believe that a violation of 19 Del.C. §1607(a)(5), may have occurred.

A hearing was held on July 12, 2006, for the purpose of establishing a factual record upon which a decision could be issued. Post hearing briefs were filed with the PERB by the Association and the Town on August 28, 2006, and August 30, 2006, respectively. The following discussion and decision result from the record thus compiled.

BACKGROUND

The Cost of Living Adjustment provision has appeared unchanged in the collective bargaining agreement since 1999. The parties' January 1, 2005 to December 31, 2007, collective bargaining agreement provides for an annual wage increase of 3% payable to all bargaining unit employees in each year of the Agreement.

During the fourth quarter of 2005, the Town's Personnel Committee, Finance Committee and Joint Personnel and Finance Committee met periodically to consider issues related to the development of the Town's 2006 budget. Police Sergeant William Wilson testified that he attended meetings of the Personnel Committee and/or the Finance Committee and/or Joint Personnel and Finance Committee in 2005. Senior Corporal Thomas Burris testified that during a meeting of the Joint Personnel and Finance

Committee on or about November 30, 2005, which he attended, there was discussion about granting a cost-of-living adjustment to the Town's non-sworn employees.

After the Police Chief and Town Manager reminded the members of the Committee that a cost-of-living adjustment would also include the police, no further discussion of a cost-of-living adjustment occurred and the focus shifted to other ways to address the salary concerns expressed by the non-sworn employees. The Joint Committee ultimately recommended that a comparative salary study with comparable communities be conducted and that an interim increase of \$1500 payable to all non-sworn employees effective January 5, 2006, be included in the 2006 budget.

The Town of Smyrna has in place a "Town Of Smyrna Personnel Policy" which, at Section 3, Pay Plan, sub-section 3.6, Cost of Living Adjustment, provides:

The "Cost of Living Index" shall mean an officially recognized Cost of Living Index relevant to the Town of Smyrna region, e.g. the United States Department of Labor Cost of Living Index for the Philadelphia region.

The "Cost of Living Index" for the previous year shall be reviewed by the Personnel Officer each November.

The Personnel Officer shall then make recommendations to the Council for any changes in the Cost of Living Allowance (COLA) for Town employees.

All Town employees may be considered for the COLA revision. The COLA will be computed as a stated percent of each employee's base wage and paid or deducted weekly with the regular pay check. The COLA shall be considered as a supplement to compensate the employee for any changes

in the buying power of their wages due to inflation or deflation.
The COLA revision shall become effective on a date to be determined
by the Mayor and Council. (U. Ex. 3)

ISSUE

Whether the Town's failure to include the sworn employees
in the \$1500 salary increase payable to non-sworn employees
for calendar year 2006, violated 19 Del.C. §1605(a)(5), as alleged?

PRINCIPAL POSITIONS OF THE PARTIES

Smyrna: The Association confuses the pay scale adjustment with a cost-of-living adjustment. Cost-of-living adjustments are developed and implemented pursuant to the Town of Smyrna Personnel Policy, Section 3, Pay Plan. Sub-section 3.6, Cost of Living Adjustment. A cost-of-living adjustment provides each employee with the same percentage increase by which the employee's current salary is multiplied to arrive at his/her new salary. In 2006, the increase each non-sworn employees received was the same dollar increase in the amount of \$1500.

The \$1500 increase for all non-sworn employees resulted from the realization by the Joint Personnel and Finance Committee that the pay scale of non-sworn employees needed review and adjustment in order for Smyrna to remain competitive in the job market. Following a limited preliminary study, the \$1500 increase was proposed and approved as an interim increase until a more comprehensive study could be undertaken and completed. Neither the comparative salary study nor the resulting interim \$1500 increase is precluded by the Town's labor agreement with the Association.

Association: The Town's initial discussion of salary increase in 2006 for non-sworn employees centered on a cost-of-living adjustment. When informed that a cost-of-living adjustment would, by contract, necessarily include the Town's sworn employees the Town thereafter referred to the 2006 increase as a pay scale adjustment.

The Association equates the contractual parity provision at issue in *Wilmington Fire Fighters Assoc. Local 1590 v. City of Wilmington*, C.A. 19035, Del. Ch., V.C. Strine (2002), with the cost-of-living provision here, which was intended to protect the sworn employees in the event the Town gave another group of employees a salary increase it did not also give to the sworn employees.

The Association contends that Council could have utilized other methods for determining the 2006 salary increase for non-sworn employees, such as compressing steps in the pay scale, increasing the percentage in each step and accelerating advancement through the steps, none of which would have triggered the contractual cost-of-living adjustment guaranteed by the police contract.

The Association argues the Town can give group increases through bonuses and/or reward individual employees at any time it considers appropriate. The Town cannot, however, grant a salary increase to its employees but carve out police officers because they have a collective bargaining agreement.

DISCUSSION

The Town raised two affirmative defenses which were orally argued at the beginning of the hearing. Specifically, the Town argues that the Association has failed to state a claim upon which relief can be granted and that PERB lacks subject matter

jurisdiction to hear the petition. In support of both positions the Town argues that the Association failed to exhaust its administrative remedies because the contractual grievance procedure has not been exhausted.

The Association responded that the Town agreed to hold the grievance in abeyance pending a decision by the PERB; there is no statutory or contractual obligation to exhaust the grievance procedure before seeking the assistance of PERB; and the grievance process is unlikely to resolve the issue because the final step of the grievance procedure involves the Mayor and Council who made the decision in the first place rather than an independent third party arbitrator.

With regard to whether the petition sets forth a claim upon which relief can be granted, the Executive Director concluded the pleadings are sufficient to raise the issue of whether a violation of 19 Del.C. §1607(a)(5) occurred when Smyrna did not include its sworn employees in the \$1500 salary increase given to non-sworn employees effective January 5, 2006.

The Executive Director also denied the second affirmative defense holding that PERB has adopted a discretionary policy of deferring matters involving contractual as well as statutory issues to the arbitration provision in the parties' collective bargaining agreement. Here, there is no arbitration provision in the parties' collective bargaining agreement. Consequently, the deferral policy does not apply and the PERB retains initial jurisdiction to determine whether the alleged statutory violation has occurred.

Beyond a contractual obligation, parties have a statutory obligation not to alter the status quo of a mandatory subject of bargaining during the term of the agreement. *Smyrna Educators' Association v. Board of Education*, ULP 87-08-015, Del. PERB, I PERB 207,

216 (1987), (citing *NLRB v. Acme Industrial Co.*, 385 US 432 (1967)). In order to prevail in this case, the Association must prove that the \$1500 increase constitutes a mandatory subject of bargaining and, secondly, that the Town's action constitutes a unilateral change in the status quo. *Cape Henlopen Education Assn. v. Bd. of Education*, ULP 91-01-058, Del. PERB, I PERB 689, 694 (1991).

There is no question that wages are specifically a term and condition of employment, (19 Del.C. §1602(n)) which parties are obligated to bargain (19 Del.C. §1602(e)). In determining the status quo, PERB may be required to interpret contractual language in order to resolve an unfair labor practice charge which is properly before it. *Smyrna Education Assn. v. Bd. of Education*, ULP 87-10-018, Del. PERB, I PERB 233, 236 (1988). Where the parties are bound by a collective bargaining agreement, contractual language which is clear and unambiguous on its face effectively establishes the status quo. *Local 1590, IAFF v. City of Wilmington*, ULP 89-09-041, I PERB 457, 469 (1990). Here, the resolution of the underlying substantive issue is controlled by the interpretation of the cost-of-living provision in the police contract. Only if the contract was violated can there be a derivative violation of 19 Del.C. §1607(a)(5).

The evidence of record consists of the parties' collective bargaining agreement, testimony from various witnesses, the Town of Smyrna Personnel Policy, the Town's meeting notes from a Personnel Committee meeting on November 1, 2005, meetings of the Finance Committee on November 10, 2005, and December 7, 2005, meetings of the Joint Personnel and Finance Committee on November 22, 2005, and November 30, 2005, and a resolution by the Town Council on December 19, 2005.

Following a thorough review and evaluation of the record, I conclude that no violation of the cost-of-living provision in the police contract occurred. Consequently, the Town did not violate its duty to bargain in good faith under 19 Del.C. §1607(a)(5).

The Association maintains it is entitled to participate in the 2006 \$1500 increase to non-sworn employees because the Town provided an across-the-board increase which violates the collective bargaining agreement. The collective bargaining agreement prohibits the Town from awarding salary increases to its non-sworn employees and carving out the police because they have negotiated wage increases. The Association's argument is overly broad concerning the scope of the disputed contractual provision.

Police Sergeant William Wilson testified the contract language was intended to prevent the Town from giving a flat rate or percentage increase to circumvent the contractual cost-of-living clause. Senior Corporal Burris testified that he understood the contract language to mean that the Town of Smyrna could not grant across-the-board salary adjustments in lieu of a cost of living adjustment. Sergeant Williams and Senior Corporal Burris likewise misconstrue the scope of the cost-of-living provision in the collective bargaining agreement.

The language of that contractual cost-of-living provision is clear and unambiguous. The provision does not apply to all general increases but rather is confined solely to "cost-of-living adjustments" and "individual salary adjustments intended to avoid cost-of-living adjustments."

The term "cost-of-living adjustment" is generally accepted and, more importantly, as set forth in Section 3 of the Town's Personnel Policy, to mean a wage or salary adjustment responding to changes in the cost-of-living over some defined period. In the

absence of a contractual restriction, the Town retains the authority to determine whether or not a cost-of-living adjustment is appropriate and in what amount.

Town Manager Hugg testified that cost-of-living adjustments have been periodically granted pursuant to Article 3.6 of the Town of Smyrna Personnel Policy, supra, which has, to the best of his knowledge, been the sole authorization for granting and calculating the amount of cost-of-living adjustments.

The fact that the Joint Personnel and Finance Committee early in the budget process discussed a cost-of-living adjustment as a possible course of action is not dispositive of this matter. The brief discussion concerning a cost-of-living adjustment during the meeting of the Joint Personnel and Finance Committee on November 22, and November 30, 2005, must be considered within the context of other events and discussions which occurred throughout the budget process.

The notes from the meeting of November 22, 2005, reference more than just a discussion about a cost-of-living adjustment. The notes from the November 30, 2005, meeting of the Joint Personnel and Finance Committee indicate that the subject of a cost-of-living adjustment was raised by concerned Town employees as opposed to Committee members. As it did on November 22, 2005, the Committee addressed the need for a comparative salary study and an immediate salary increase related thereto.

Not only was Town Manager Hugg the most knowledgeable witness about the budget process, he attended every meeting where budget items were discussed. Mr. Hugg testified that not all non-sworn employees receive a salary increase each year. Increases for some employees, depending upon their years of service, occur only every two (2) or three (3) years. Council recognized that, excluding police officers for whom a salary

comparison study was conducted during the recent contract negotiation, the Town's non-sworn employees may be below or barely at the minimum of the prevailing area market rate. This resulted in the decision by Council to authorize an area comparative salary survey and grant an across-the-board pay scale adjustment.

In the fall of 2005, William Hill was a member of the Smyrna Town Council and Chairman of the Finance Committee. Mr. Hill's testimony was consistent with that of Town Manager Hugg who testified that Town employees had complained they were being paid less than their counterparts in surrounding communities, in some cases several thousand dollars less, and that this was the primary reason for the \$1500 salary increase to non-sworn employees.

It is clear that several options were discussed during the early stages of the 2006 budget process. It is equally clear that as the budget process progressed those discussions narrowed and focused upon the salary scale inequities resulting in the decision to adjust the pay scale. A two-step approach to address the existing salary inequities involving the non-sworn employees was adopted: 1) an immediate across-the-board salary increase; and 2) a salary survey of the comparable surrounding employers.

A cost-of-living adjustment is fundamentally different from an adjustment to the pay scale. A cost-of-living adjustment is intended to maintain the buying power of the employees' wages as the cost-of-living increases. Expressed as a percent it impacts wages but not the equity of the pay scale itself. A pay scale adjustment in the form of a flat amount given to each employee provides a relatively greater percentage increase in wages to the employees at the lower end of the pay scale and in so doing compresses the scale.

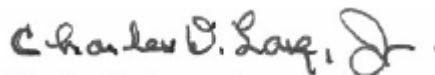
Consequently, the \$1500 salary increase to non-sworn employees did not constitute a cost-of-living adjustment within the meaning of the parties' collective bargaining agreement to which the police officers were entitled.

The decision in *Wilmington Fire Fighters Assoc. v. City of Wilmington, supra*, cited by the Union, is not controlling in this matter for the reasons that the issue there involved the application of a contractual "parity" provision under a different fact scenario.

DECISION

The Town of Smyrna's failure to include the sworn employee in the \$1500 salary increase payable to non-sworn employees for calendar year 2006, did not violate 19 Del.C. §1605(a)(5), as alleged.

Date: October 5, 2006



Charles D. Long, Jr.
Executive Director
Public Employment Relations Board